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No. 85-889

In The
Supreme Court of the United States
October Term, 1985

THE STATE OF COLORADO,
Petitioner,
v.
STEVEN LEE BERTINE,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE RESPONDENT BY THE COLORADO CRIMINAL DEFENSE BAR, INC. AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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I. STATEMENT OF THE FACTS

A recitation of the pertinent facts has been adequately set forth by the respondent and the ACLU as *amici curiae* and is here adopted.

II. PRELIMINARY STATEMENT

Amici curiae Colorado Criminal Defense Bar, Inc. and National Association for Criminal Defense Lawyers submit this brief because this case presents important issues concerning the permissible scope of inventory searches. The high expectation of privacy a citizen enjoys in his luggage must be weighed against the governmental purposes served by such searches. While this Court has previously addressed certain Fourth Amendment inventory search issues, it has not yet resolved the issue of the reasonableness of an inventory procedure such as that presented here. Moreover, the balancing of interests in which the Court must engage will have a far-reaching effect.

Additionally, *amici* intend to counter what they believe to be mischaracterizations of the holding below and of prior case law pertaining to inventory search by the United States as *amicus curiae*. It would be improvident and unprecedented in the extreme if the *per se* approach advocated by the United States were to be applied to the facts of this case.

III. SUMMARY OF ARGUMENT

Contrary to the assertion of the United States, the Colorado Supreme Court, in its opinion below, does not fashion a *per se* rule that police never may inventory contents of containers found within a motor vehicle. (*See*

Brief of the United States at 1.) The holding of the Colorado Supreme Court was that where the defendant was available to make alternative arrangements for safekeeping of personalty, and secure facilities for storage were also available, a detailed inventory search of the defendant's luggage found within the vehicle was unreasonable under the Fourth Amendment.

The United States dangerously and unjustifiably frames the issue presented in this petition with broad strokes, not supported by the facts or the law. The state court did not hold, and this Court need not decide on this record, whether under *any* circumstances, an inventory search may extend to containers found inside the vehicle.[1] Rather, the issue is one not previously decided by this Court—whether a detailed inventory search of closed luggage found within a vehicle whose owner has been arrested for a traffic offense was unreasonable, when the owner was present to make alternative arrangements, secure storage facilities were available and there were no indications that the contents were at all dangerous.

Although the requirements of probable cause or warrant are not applicable to this routine inventory, the police conduct in this case still is governed by the Fourth Amendment *reasonableness* requirement. It has often been said, but never gainsaid, that the Fourth Amendment prohibits only *unreasonable* searches and seizures.

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[1]This Court consistently has pointed out the error of analyzing Fourth Amendment cases with such broad strokes. For example, in *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967), the Court observed "to say that gambling raids may never be made without a warrant is not to say that gambling raids may never be made."

The reasonableness of each search "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979). Whether a search and seizure is unreasonable under the Fourth Amendment "depends on the facts and the circumstances of each case." *Cooper v. California,* 386 U.S. 58, 59 (1967) (citing *Preston v. United States,* 376 U.S. 364 (1965)). The test for reasonableness "cannot be fixed by per se rules; each case must be decided on its own facts." *Coolidge v. New Hampshire,* 403 U.S. 443, 509-510 (1971) (Black, J., concurring and dissenting).

The United States would subvert this well-established and inexorable balancing process in favor of a *per se* rule to be forged out of the facts of this case for all inventory searches. The United States boldly claims that past decisions of this Court have done away with the balancing requirement and have "rejected" consideration of "less intrusive means" in all inventory searches. *See* Brief of the United States at 12-13. This novel approach to judicial activism, if adopted, would turn Fourth Amendment analysis on its head. From the government's coign of vantage, the distinctions among the stationhouse inventory, with its clearly defined set of compelling state interests, the inventory search of an abandoned auto where neither secure storage facilities or the owner were available, and the inventory of personal luggage in the field where both the owner and secure storage facilities were available, are constitutionally insignificant. This the United States urges, if not based on precedent, at least in the interest of expediency. If this were adopted, the result, far from ensuring the reasonableness of governmental intrusions into legitimately personal effects, would establish a *per se* rule of *unreasonableness.*

IV. THE HOLDING OF THIS COURT IN OPPERMAN DOES NOT JUSTIFY THE INVENTORY SEARCH HERE

In *South Dakota v. Opperman*, 428 U.S. 364 (1976), this Court upheld a routine inventory search of an unoccupied vehicle lawfully impounded for parking violations. As in other Fourth Amendment contexts, the reasonableness of the inventory procedure was determined in light of the facts and circumstances of the case before the Court:

> The Vermillion police were indisputably engaged in a caretaking search of a lawfully impounded automobile. . . . The inventory was conducted only after the car had been impounded for multiple parking violations. The owner, having left his car illegally parked for an extended period, and thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings. The inventory itself was prompted by the presence in plain view of a number of valuables inside the car. . . . [T]here is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.
>
> On this record we conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not "unreasonable" under the Fourth Amendment.

428 U.S. at 375-76. *Opperman* did not give blanket approval to all police inventory searches, and, as pointed out by the Colorado Supreme Court in its opinion below, *Opperman* "did not foreclose challenges regarding the per-

missible scope of such searches." *People v. Bertine*, 706 P.2d 411, 414 (Colo. 1985).[2]

The facts at bar differ in several important respects from the *Opperman* facts. Bertine was arrested with his automobile and thus available to indicate what he wanted done to safeguard his property. Unlike *Opperman*, the inventory here was not prompted by any observation of valuables in plain view. In *Opperman*, the impound lot was "the old county highway yard" with "a wooden fence partially around part of it, and kind of a dilapidated wire fence, a makeshift fence," where theft had been a problem in the past. 428 U.S. at 366, n.1. In the case at bar, the storage lot was "entirely enclosed by a six-foot fence . . . locked and lighted" and routinely patrolled. *Bertine* at 417. Moreover, *Opperman* did not involve the search of any closed containers in the vehicle.

In light of the differences in circumstances, the *Opperman* holding is not controlling here. Rather, the reasonableness of the police conduct in the case at bar must be determined by balancing "the governmental and societal interests advanced to justify such intrusions against the constitutionally protected interest of the individual citizen in the privacy of his effects." *Opperman* at 378.

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[2]It should be emphasized that what ultimately occurred in *Opperman* may well occur here as well. On remand, the state supreme court once again held the inventory illegal, but this time relied on the search and seizure provisions of the South Dakota state constitution.

The United States in its *amicus curiae* brief at 12-13 incorrectly suggests that *Opperman* establishes a *per se* rule of reasonableness for any routine inventory search. Such a proposition finds no support in *Opperman* itself, where this Court carefully delineated the expectations of privacy with respect to automobiles vis-a-vis the governmental interests in performing an inventory, *Opperman* at 367-369, and tailored its holding to the facts.

In the case at bar, the governmental interest in an inventory is slight when compared to that in *Opperman*, and Bertine's privacy expectations in his closed backpack considerably greater than in an automobile. Compare *Chambers v. Maroney*, 399 U.S. 42 (1970), with *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *U.S. v. Chadwick*, 433 U.S. 1 (1977). The *Opperman* plurality opinion asserted that routine inventory procedures serve three governmental interests: (1) The protection of the owner's property while it remains in police custody, (2) the protection of the police against claims or disputes over lost or stolen property, and (3) the protection of the police from potential danger. *Opperman* at 369. In this case, the owner of the vehicle was present and could have been asked if he wished to make other arrangements for the vehicle or if he was willing to waive his rights against the police department in lieu of search. The first two objectives cited in *Opperman*—protection of the owner's property and protection against claims—would have been adequately, if not better, served by these alternatives. *See, e.g., United States v. Wilson*, 636 F.2d 1161 (8th Cir. 1980); *State v. Killcrease*, 379 So.2d 737 (La. 1980); *State v. Mangold*, 414 A.2d 1312 (N.J. 1980); *State v. Goff*, 272 S.E.2d 457 (W. Va. 1980).

In this case the facts that the storage facility was secure and the probable duration of storage short also support the conclusion that the inventory was unnecessary and hence unreasonable. Moreover, because the backpack was zippered shut and there was no danger of any items falling out, the first two governmental purposes would have been better served by inventory of the backpack as a unit. *United States v. Wilson, supra; United States v. Bloomfield,* 594 F.2d 1200 (8th Cir. 1979).

True enough, this Court's decision in *Illinois v. Lafayette,* 462 U.S. 640 (1983), states that the "reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means," 462 U.S. at 647. However, this is not to say, as the United States would seem to contend, that the availability of less intrusive means is irrelevant. (See Brief of the United States at 14.) As the Colorado Supreme Court correctly pointed out, the availability of such alternative means indeed lessens the governmental interests in an inventory. *See Bertine* at 417, n.7.

The third governmental interest—protection of the police from potential danger—is relatively slight absent specific circumstances indicating danger. Justice Powell, concurring in *Opperman* noted that the danger associated with impounding unsecured vehicles is rare. *Opperman* at 378.[3] As one court concluded under circumstances analogous but not identical to those at bar:

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[3]One noted authority has criticized the protection of the police justification more strongly: "[I]t is difficult to take this contention seriously—if police are endangered by unsearched cars in their possession, then it would seem that the public is endangered by cars parked on the streets or other public or semi-public places." 2 W. LaFave, *Search and Seizure,* Section 7.4(a) at 565, n.16 (1978). The four dissenters in *Opperman* also disagreed with the protection of the police theory.

> It is simply not reasonable to assume that, given the circumstances in which this knapsack was found, storing it as a unit at the police station, without specific knowledge of its contents, can pose a danger to police.

United States v. Bloomfield, supra, at 1203. Here, the "danger" was all but nonexistent because the car was taken to a private storage lot and not kept in police custody. In any event, since there was no specific indication of danger in the facts at bar, the protection of the police rationale cannot justify the inventory search of the backpack.

The lessened governmental interests in the inventory procedure here simply did not outweigh Bertine's constitutionally protected privacy interest in the contents of his backpack. As discussed in the opinion of the state supreme court below, an individual's legitimate expectations of privacy in personal luggage are greater than in an automobile. *Bertine* at 414-415. *Cf. Arkansas v. Sanders,* 442 U.S. 753 (1979); *United States v. Chadwick,* 433 U.S. 1 (1977). In light of the less intrusive alternatives and the lack of any specific indication of danger, the inventory procedure here was unnecessary and hence unreasonable.[4]

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[4]It also should be noted that the inventory upheld in *Opperman* was conducted strictly in accordance with a regularized set of police regulations. In the case at bar, there was a trial court finding that the officers followed standard procedures. However, since that ruling was for the prosecution and against the defendant, it was not reviewable in an interlocutory appeal. See C.A.R. 4.1(a); *People v. Weeams,* 665 P.2d 619, 623 (Colo. 1983) (defendant not entitled to interlocutory review under C.A.R. 4.1). Thus, although the brief of the United States as *amicus curiae* makes much of the fact that the Colorado Supreme Court did not disturb the trial court's findings that the police officer performed the inventory according to standard procedure and in good faith (see Brief for the United States at 5, 20), under C.A.R. 4.1 and *Weeams,* these rulings were nonreviewable.

V. THE STATE COURT CORRECTLY HELD THAT ILLINOIS v. LAFAYETTE IS INAPPOSITE TO THIS CASE.

The sole issue in *Illinois v. Lafayette*, 462 U.S. 640 (1983), as succinctly put in Chief Justice Burger's prefatory words, was "whether, at the time an arrested person arrives at a police station, the police may, without obtaining a warrant, search a shoulder bag carried by that person." *Id.* at 641. *Lafayette* was a *stationhouse* inventory case. *Lafayette* does not control in a field inventory situation where, as here, there is a police search of personal luggage found in a vehicle which is about to be towed away because the owner is under arrest for a traffic offense.

The decision in *Lafayette* was a response to legitimate governmental needs arising in the custodial setting. Indeed, the Court observed that the governmental interests underlying a stationhouse search of an arrested person's possessions, "in some circumstances" may be greater than those supporting a search immediately following arrest. 462 U.S. at 645. To be sure, some of these interests are similar to those attending the inventory search of defendant's vehicle in this case. However, *Lafayette* entailed considerations peculiar only to the stationhouse which are not pertinent to the inventory in the field. The stationhouse search in *Lafayette* was valid because the government had an interest in preventing dangerous instrumentalities from getting into the hands of inmates. This need is fundamental. Indeed, when one considers that the strong government interest increases arithmetically with each inmate simultaneously detained in the care and custody of the police, this need is compelling.

As the state court held, *Lafayette,* while inapplicable to the inventory search of the defendant's luggage in this case, was consistent with Colorado's view giving police wide latitude in conducting searches in jail settings. *Bertine, supra,* at 416, 417.

The United States would have the Court view this case as controlled by *Lafayette* simply because this was an inventory search rather than an investigatory search. Of course, the government does not argue that, where the government interest is not investigatory, the Fourth Amendment has no application.

> It is surely anomalous to say that the individual and his property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

Camara v. Municipal Court, 387 U.S. 523, 530 (1967). The mere fact that the intrusion into the privacy of an individual comes under the rubric of inventory is plainly the one common thread in *Opperman, Lafayette* and this case. But this common factor alone does not compel the same result. Consistent with the balancing process to be applied to each set of facts, *see Coolidge v. New Hampshire, supra,* we have in the case at bar factors entering into the equation not present in either *Lafayette* or *Opperman,* and these factors compel a different result. In *Lafayette,* there was the significant government interest, far greater than even those attending a search incident to arrest, in preserving the safety and well-being not only of the arrestee, but others in custody on the premises.

Here, on the other hand, there is an inventory in the field at the locus of a traffic infraction and far removed

from the stationhouse. The personal effect searched was not a car, as in *Opperman,* but luggage, as in *Sanders* and *Chadwick.* The defendant was available. The storage area was secure. The backpack could easily and safely have been left in the car. Thus, in applying the balancing of interests in this case, there simply was no degree or quantity of governmental interest that outweighed the respondent's enduring expectation of privacy in his own luggage. *Cf. Arkansas v. Sanders,* and *United States v. Chadwick, supra.*

The *Lafayette* court took pains to trace the person of the arrestee from the moment of arrest, "along the continuum" of arrest to incarceration. That the decision is limited to the facts is evident from the court's repeated references to the government's interest at the stationhouse. *Lafayette* clearly was not intended to lay down a *per se* rule for all inventory searches. The question of reasonableness of an inventory search under the circumstances now before the Court is to be decided by a balancing of competing interests which are peculiar to this case, and which were not present either in *Lafayette* or *Opperman. See Bell v. Wolfish, supra; Preston v. United States, supra; Cooper v. California, supra; Coolidge v. New Hampshire, supra.* On balance therefore, it must be concluded that the search of the backpack was unreasonable

VI. CONCLUSION

For all of the reasons set forth hereinabove, together with those set forth in respondent's brief and the brief of *amicus curiae* the American Civil Liberties Union, the

judgment of the Colorado Supreme Court in this case should be affirmed.

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Respectfully submitted,

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